

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TINA CALILUNG, et al.,

Plaintiffs,

v.

ORMAT INDUSTRIES, LTD., et al.,

Defendants.

Case No. 3:14-CV-0325-RCJ (VPC)

ORDER

The parties in this case agree that a protective order should be entered, but disagree whether the proposed protective order should include language permitting a designation of “attorney’s eyes only.” The parties filed a joint notice of filing competitive protective orders (#132), and the court ordered the parties to file points and authorities in support of their respective positions (#131). The parties have done so, (#s 134 & 135), and this order follows.

This *qui tam* action, brought under the False Claims Act (“FCA”), arises from defendants’ (collectively “Ormat defendants” or “Ormat”) allegedly fraudulent actions by which they received approximately \$136,800,000 in grant money from the United States pursuant to Section 1603 of the American Recovery and Reinvestment Act of 2009 (“ARRA”). Tina Calilung and Jamie Kell (“relators”) are former employees of Ormat and allege that Ormat engaged in a scheme to defraud the United States by submitting false information to the Secretary of the Treasury to obtain grants under Section 1603 of ARRA (#1, para. 57).

Relators’ position is that an “attorney’s eyes only” provision in the protective order is not warranted for three reasons. First, under ordinary circumstances, a client has complete access to all information exchanged during discovery and at trial (#134). Second, while “attorney’s eyes only” provisions are common in litigation involving intellectual property disputes, products liability actions, or cases in which parties or non-parties might gain a competition advantage from unrestricted access to information produced during discovery, such is not the case here. *Id.*

1 It is undisputed that neither relator works for a competitor of Ormat defendants, and they agree
2 to be bound by their proposed protective order. *Id.* Third, the Nevada Rules of Professional
3 Conduct are intended to foster the relationship between attorney and client to enable the client to
4 participate intelligently in the litigation and so that the attorney and client may make decisions
5 jointly about strategy and other litigation decisions. *Id.*

6 Ormat defendants contend that this case warrants the two-tiered protections that a “highly
7 confidential– attorney’s eyes only” designation, and they point out that “confidential” and
8 “highly confidential” designations are considered routine in federal discovery practice and result
9 in efficiencies that avoid the cost and time of motion practice (#135); *see Oracle USA, Inc., v.*
10 *Rimini St., Inc.* No. 2:10-CV-00106-LRH-PAL, 2012 WL 6100306, at *10 (D. Nev. Dec. 7,
11 2012). In addition, the anticipated discovery exchanges may include trade secret and proprietary
12 information about Ormat’s geothermal plants (#135). Finally, Ormat is concerned that based on
13 prior employment actions regarding relators, they harbor “strong personal animus” towards
14 Ormat, which may cause them to use highly confidential information to harm Ormat’s business
15 interests. *Id.*

16 “[D]istrict courts [have] broad latitude to grant protective orders to prevent disclosure of
17 materials for many types of information, including, but not limited to trade secrets, or other
18 confidential research, development, or commercial information. *See Fed.R.Civ.P. 26(c)(7).*”
19 *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). The district court has
20 discretion to fashion a protective order that is appropriate and to decide what level of protection
21 is necessary. *See Fed. R.Civ.P. 26(c).* It is the burden of the party seeking a heightened level of
22 confidentiality to demonstrate that the trade secret or other confidential information – if
23 disclosed – would harm that party’s interests. *Direct TV, Inc. v. Trone*, 209 F.R.D. 455, 459-60
24 (C.D. Cal. 2002). If this showing is made, the burden shifts to the party opposing the two-tier
25 designation to demonstrate that an “attorney’s eyes only” designation is improper. The court
26 must then balance the interests of the parties to decide whether an “attorney’s eyes only”
27 provision should be included in the protective order.

28

1 The court is not convinced that a standard two-tiered “attorney’s eyes only” designation
2 is appropriate in this case. This is not a dispute between competitors over a patent infringement
3 or trade secrets, which typically require “attorney’s eyes only” designation in protective orders.
4 Ormat’s main concern is that relators may disseminate highly confidential documents in
5 retaliation related to their employment with Ormat. While there may be an exchange of highly
6 sensitive documents regarding Ormat’s business, drawings, specs, and other financial and
7 technical information that could harm Ormat if disseminated, Ormat concedes there will
8 probably be only a fairly small number of documents so designated. To address Ormat’s
9 concerns, the protective order will include a modified “attorney’s eyes only” provision, which
10 shall only allow relators to review such documents with their attorneys present. This means that
11 relators may not copy, memorialize or possess any part of any document they are required to
12 review in their attorneys’ presence. Although this court has no reason to believe relators will
13 violate such provisions, relators are reminded that violations of the protective order may lead to
14 sanctions, including dismissal of the case. Similarly, Ormat is cautioned to be reasonable in the
15 designation of these documents and that sanctions may be imposed for unreasonable over-
16 designation of confidential information.

17 Apart from this dispute, the parties are also directed to incorporate provisions in the
18 protective order to comport with *Kamakana v. City and County of Honolulu*, 447 F.2d 1172 (9th
19 Cir. 2006). A sample order is attached.

20 Based upon the foregoing, relators are ordered to submit a proposed protective order to
21 the court within fifteen days of the date of this order. Prior to submission, relators shall provide
22 the proposed protective order to Ormat for review, relators shall conform the new protective
23 order to the draft relators previously submitted to the court (#132, Ex, A), and relators shall
24 revise the proposed protective order to take this order into account.

25 **IT IS SO ORDERED.**

26 DATED: July 7, 2015.

27 
28 VALERIE P. COOKE
UNITED STATES MAGISTRATE JUDGE

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3) 3:0 -CV-
4)
5 Plaintiff,)
6 vs.) STIPULATED PROTECTIVE ORDER
7)
8 Defendants.)
9)

10 In order to protect the confidentiality of confidential information obtained by the parties
11 in connection with this case, the parties hereby agree as follows:

12 1. Any party or non-party may designate as “confidential” (by stamping the relevant page
13 or other otherwise set forth herein) any document or response to discovery which that party or
14 non-party considers in good faith to contain information involving trade secrets, or confidential
15 business or financial information, subject to protection under the Federal Rules of Civil
16 Procedure or Nevada law (“Confidential Information”). Where a document or response consists
17 of more than one page, the first page and each page on which confidential information appears
18 shall be so designated.

19 2. A party or non-party may designate information disclosed during a deposition or in
20 response to written discovery as “confidential” by so indicating in said response or on the record
21 at the deposition and requesting the preparation of a separate transcript of such material.
22 Additionally a party or non-party may designate in writing, within twenty (20) days after receipt
23 of said responses or of the deposition transcript for which the designation is proposed, that
24 specific pages of the transcript and/or specific responses be treated as “confidential” information.
25 Any other party may object to such proposal, in writing or on the record. Upon such objection,
26 the parties shall follow the procedures described in paragraph 8 below. After any designation
27 made according to the procedure set forth in this paragraph, the designated documents or
28 information shall be treated according to the designation until the matter is resolved according to
the procedures described in paragraph 8 below, and counsel for all parties shall be responsible

1 for making all previously unmarked copies of the designated material in their possession or
2 control with the specified designation.

3 3. All information produced or exchanged in the course of this case (other than
4 information that is publicly available) shall be used by the party or parties to whom the
5 information is produced solely for the purpose of this case.

6 4. Except with the prior written consent of other parties, or upon prior order of this Court
7 obtained upon notice to opposing counsel, Confidential Information shall not be disclosed to any
8 person other than:

9 (a) counsel for the respective parties to this litigation, including in-house counsel and co-
10 counsel retained for this litigation;

11 (b) employees of such counsel;

12 (c) individual defendants, class representatives, any officer or employee of a party, to the
13 extent deemed necessary by Counsel for the prosecution or defense of this litigation;

14 (d) consultants or expert witnesses retained for the prosecution or defense of this
15 litigation, provided that each such person shall execute a copy of the Certification annexed to this
16 Order as Exhibit "A" (which shall be retained by counsel to the party so disclosing the
17 Confidential Information and made available for inspection by opposing counsel during the
18 pendency or after the termination of the action only upon good cause shown and upon order of
19 the Court) before being shown or given any Confidential Information and provided that if the
20 party chooses a consultant or expert employed by [THE CORPORATE DEFENDANT] or one of
21 its competitors (as listed on Appendix A), the party shall notify the opposing party, or
22 designating nonparty, before disclosing any Confidential Information to that individual and shall
23 give the opposing party an opportunity to move for a protective order preventing or limiting such
24 disclosure;

25 (e) any authors or recipients of the Confidential Information;

26 (f) the Court, Court personnel, and court reporters; and

27 (g) witnesses (other than persons described in paragraph 4(e)). A witness shall sign the
28 Certification before being shown a confidential document. Confidential Information may be

1 disclosed to a witness who will not sign the Certification only in a deposition at which the party
2 who designated the Confidential Information is represented or has been given notice that
3 Confidential Information shall be designated "Confidential" pursuant to paragraph 2 above.
4 Witnesses shown Confidential Information shall not be allowed to retain copies.

5 5. Any persons receiving Confidential Information shall not reveal or discuss such
6 information to or with any person who is not entitled to receive such information, except as set
7 forth herein.

8 6. Unless otherwise permitted by statute, rule or prior court order, papers filed with the
9 court under seal shall be accompanied by a contemporaneous motion for leave to file those
10 documents under seal, and shall be filed consistent with the court's electronic filing procedures
11 in accordance with Local Rule 10-5(b). Notwithstanding any agreement among the parties, the
12 party seeking to file a paper under seal bears the burden of overcoming the presumption in favor
13 of public access to papers filed in court. *Kamakana v. City and County of Honolulu*, 447 F.2d
14 1172 (9th Cir. 2006).

15 7. A party may designate as "Confidential" documents or discovery materials produced
16 by a non-party by providing written notice to all parties of the relevant document numbers or
17 other identification within thirty (30) days after receiving such documents or discovery materials.
18 Any party or non-party may voluntarily disclose to others without restriction any information
19 designated by that party or non-party as confidential, although a document may lose its
20 confidential status if it is made public.

21 8. If a party contends that any material is not entitled to confidential treatment, such
22 party may at any time give written notice to the party or non-party who designated the material.
23 The party or non-party who designated the material shall have twenty-five (25) days from the
24 receipt of such written notice to apply to the Court for an order designating the material as
25 confidential. The party or non-party seeking the order has the burden of establishing that the
26 document is entitled to protection.

1 9. Notwithstanding any challenge to the designation of material as Confidential
2 Information, all documents shall be treated as such and shall be subject to the provisions hereof
3 unless and until one of the following occurs:

4 (a) the party or non-party claims that the material is Confidential Information withdraws
5 such designation in writing; or

6 (b) the party or non-party who claims that the material is Confidential Information fails to
7 apply to the Court for an order designating the material confidential within the time period
8 specified above after receipt of a written challenge to such designation; or

9 (c) the Court rules the material is not confidential.

10 10. All provisions of this Order restricting the communication or use of Confidential
11 Information shall continue to be binding after the conclusion of this action, unless otherwise
12 agreed or ordered. Upon conclusion of the litigation, a party in the possession of Confidential
13 Information, other than that which is contained in pleadings, correspondence, and deposition
14 transcripts, shall either (a) return such documents no later than thirty (30) days after conclusion
15 of this action to counsel for the party or non-party who provided such information, or (b) destroy
16 such documents within the time period upon consent of the party who provided the information
17 and certify in writing within thirty (30) days that the documents have been destroyed.

18 11. The terms of this Order do not preclude, limit, restrict, or otherwise apply to the use
19 of documents at trial.

20 12. Nothing herein shall be deemed to waive any applicable privilege or work product
21 protection, or to affect the ability of a party to seek relief for an inadvertent disclosure of material
22 protected by privilege or work product protection.

23 13. Any witness or other person, firm or entity from which discovery is sought may be
24 informed of and may obtain the protection of this Order by written advice to the parties'
25 respective counsel or by oral advice at the time of any deposition or similar proceeding.

26 **CERTIFICATION**

27 I hereby certify my understanding that Confidential Information is being provided to me
28 pursuant to the terms and restrictions of the Protective Order dated _____, in

_____, Civil No. _____. I have been given a copy of that Order and read it. I agree to be bound by the Order. I will not reveal the Confidential Information to anyone, except as allowed by the Order. I will maintain all such Confidential Information – including copies, notes, or other transcriptions made therefrom – in a secure manner to prevent unauthorized access to it. No later than thirty (30) days after the conclusion of this action, I will return the Confidential Information -- including copies, notes or other transcriptions made therefrom – to the counsel who provided me with the Confidential Information. I hereby consent to the jurisdiction of the United States District Court for the purpose of enforcing the Protective Order.

DATED:_____.

EXHIBIT "A"